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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92051006
Party	Defendant 12 Interactive, LLC
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Attachments	motion_to_quashPerkSpot.pdf (4 pages)(13359 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

COUCH/BRAUNSDORF AFFINITY, INC.,)
Petitioner/Counter-Registrant,)
v.) Cancellation No. 92051006
12 INTERACTIVE, LLC,)
Registrant/Counter-Petitioner))

REGISTRANT'S MOTION TO QUASH NOTICES OF DEPOSITION

Petitioner/Counter-Registrant, Couch/Braunsdorf Affinity, Inc. ("Petitioner"), served Supplemental Pretrial Disclosures that name three never-before disclosed witnesses, on October 20, 2010, just days before the close of its testimony period. At the same time, Petitioner also served Notices of Deposition for its three surprise witnesses, to be taken October 28 and 29. Petitioner's Notices of Deposition should be quashed pursuant to Federal Rule of Civil Procedure 37(c).

Petitioner failed to disclose the three witnesses named for the first time in its Supplemental Pretrial Disclosures (Branden Smythe, Sean Keeler, and Daniel Kristal) in either its Initial Disclosures or its Pretrial Disclosures, and thus should be precluded from taking their testimony. Petitioner was required to identify Mr. Smythe, Mr. Keeler, and Mr. Kristal in it is Initial Disclosures as individuals likely to have discoverable information that Petitioner may use to support its claims under Rule 26(a), made applicable to this proceeding by 37 C.F.R. § 2.120(a)(1). Petitioner failed to do so. Petitioner further failed to supplement its Initial

Disclosures at any time to add these witnesses. Indeed, to date, Petitioner still has not amended its Initial Disclosures.

Rule 37(c) states that "[i]f a party fails to...identify a witness as required by Rule 26(a)...the party is not allowed to use that...witness to supply evidence...unless the failure was substantially justified or harmless." Furthermore, the Trademark Rules allow the Board to make "any appropriate order" to sanction the failure to make a required initial disclosure. 37 C.F.R. § 2.120(g)(2).

Petitioner's withholding of this witness information is not substantially justified. Two of the surprise witnesses, Mr. Keeler and Mr. Kristal, are employees of one of Petitioner's subsidiaries or related companies. Petitioner knew or should have known that these employees were likely to have discoverable information, and thus that they needed to be disclosed. Even if Petitioner only found out that Mr. Smythe, an employee of Registrant, might have discoverable information through Registrant's production of documents, that production was made over a month ago, and well in advance of Petitioner's service of its Pretrial Disclosures. Registrant had ample time to review the documents, supplement its Initial Disclosures, and serve complete Pretrial Disclosures by the time they were due on September 17, 2010. Instead, at no time prior to October 20, 2010 did Petitioner inform Registrant that it might call these witnesses, or even that these individuals may have discoverable information.

Neither is Petitioner's failure to disclose these witnesses harmless. As the discovery period has now closed, Registrant has no ability at this late date to request discovery regarding any information these witnesses may have. Moreover, given that Registrant had no knowledge that these witnesses even existed until the week before Petitioner proposes to depose them—the

week Petitioner's testimony period closes—Registrant is simply unable to adequately prepare for

these depositions.

Petitioner, through its late-filed Supplemental Pretrial Disclosures and late-served

Notices of Deposition, appears to aim to make this proceeding a trial by surprise—the very thing

the mandatory disclosure rules are intended to prevent. Pursuant to Rule 37 and 37 C.F.R. §

2.120, Petitioner's Notices of Deposition to Messrs. Smythe, Keeler, and Kristal should therefore

be quashed.

Respectfully submitted,

Dated: October 27, 2010

/Michael G. Kelber/

One of the Attorneys for Registrant,

12 Interactive, LLC

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-3-

CERTIFICATE OF SERVICE

I, Katherine Dennis Nye, an attorney, state that I served a copy of *REGISTRANT'S MOTION TO QUASH NOTICES OF DEPOSITION* upon counsel for Petitioner-Counter

Registrant:

Philip A. Jones BRINKS HOFER GILSON & LIONE 455 N. Cityfront Plaza Dr., Ste 3600 Chicago, IL 60611-5599

via First Class U.S. Mail and email on this 27th day of October, 2010.

/Katherine Dennis Nye/
Katherine Dennis Nye

NGEDOCS: 1747312.1